STATE OF MICHIGAN

COURT OF APPEALS

TERESA CLARK,

Plaintiff-Appellant,

v

CARLEY COMPANY, INC., D/B/A PUTTER'S RESTAURANT

Defendant-Appellee.

UNPUBLISHED
August 17, 2004

No. 249073
Oakland Circuit Court
LC No. 02-038745-NO

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

Plaintiff filed suit against defendant in this premises liability action and alleged that defendant negligently maintained its premises, which caused plaintiff to slip and fall and sustain several injuries. Defendant successfully moved for summary disposition under MCR 2.116(C)(10). Plaintiff appeals the trial court's order, and we affirm.

I. FACTS

Defendant operates Putters Restaurant ("Putters") in New Hudson, MI. On March 3, 1999, plaintiff, accompanied by her seven-year-old son as well as her friend, Dawn Gardner, visited Putters between 7:00 p.m. and 7:30 p.m. to get dessert after they dropped plaintiff's and Gardner's daughters off at a nearby dance class. Plaintiff testified at her deposition that she had visited Putters approximately once per week for the six months leading up to the incident in question. She further testified that when she arrived at Putters, it was cold, but neither raining nor snowing, but the ground was wet.

Plaintiff, plaintiff's son, and Gardner stayed at Putters for approximately one hour. When the three left the restaurant, there was a wet, heavy snow falling. Plaintiff observed that the ground was wet and slushy, and that she feared falling. Plaintiff further testified that she believed the steps leading from the restaurant to the parking lot were too steep, so she opted to walk on a wheelchair ramp; the ramp and the steps were the only two ways to reach the parking lot from the restaurant, aside from emergency exits. Plaintiff testified that when she neared the bottom of the ramp, her feet slipped out from under her, and she fell backwards.

Plaintiff sustained a broken ankle and filed the instant suit.

II. STANDARD OF REVIEW

We review motions for summary disposition granted under MCR 2.116(C)(10) de novo, considering the facts in the light most favorable to the nonmoving party. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

> A motion under MCR 2.116(C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence. The adverse party may not rest on mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial. All this supporting and opposing material must be considered by the court. [*Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 7; 614 NW2d 169 (2000) (citations omitted).]

III. ANALYSIS

Plaintiff argues that the trial court improperly granted summary disposition in defendant's favor. She says (1) the slippery condition of the ramp was not open and obvious, and (2) that, even if the condition was open and obvious, special aspects of the hazard rendered it unreasonably dangerous, which gave rise to a duty on the part of defendant to take reasonable steps to protect plaintiff from injury.

Generally, a premises possessor owes invitees[1] a duty to exercise reasonable care to protect invitees from unreasonable risks of harm caused by dangerous conditions on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001) (citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995)). This duty does not extend to hazardous conditions that are open and obvious, unless there exist special aspects of an open and obvious condition that create an unreasonable risk of harm, in which case the premises possessor has a duty to take reasonable steps to protect invitees from the risk. *Lugo, supra* at 516-517. "'[W]here the dangers are *known to the invitee or are so obvious that the invitee might reasonably be expected to discover them*, an invitor owes no duty to protect or warn the invitee' " unless the risk of harm is unreasonable despite being obvious or known to the invitee. *Bertrand, supra* at 609-611 (citing and quoting *Riddle v McLouth Steel Prods Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992) (emphasis added)). "The test to determine if a danger is open and obvious is whether 'an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection.'" *Joyce v Rubin*, 249 Mich App 231, 238; 642 NW2d 360 (2002) (quoting *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993)). However, the open and obvious analysis is somewhat different in cases in which the hazardous condition is created by ice and/or snow. Plaintiff cites *Quinlivan v The Great Atlantic & Pacific Tea Co, Inc*, 395 Mich 244; 235 NW2d 732 (1975), as authority on this point. In *Quinlivan*, our Supreme Court stated:

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[1] It is undisputed that plaintiff's status here was that of a business invitee; thus, we will dispense with the traditional analysis of whether plaintiff was, in fact, and invitee.

> [W]e reject the prominently cited notion that ice and snow hazards are obvious to all and therefore may not give rise to liability. While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation. [*Quinlivan, supra* at 261.]

However, this Court has noted that the rule in *Quinlivan* has evolved in light of later cases. In *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1; 649 NW2d 392 (2002), this Court considered *Quinlivan* in light of later cases, *Corey (On Remand), supra* at 7-8, and held:

> After analyzing both *Lugo* and *Joyce*, we conclude that these prior analyses in *Quinlivan* and *Bertrand* on the interplay between the open and obvious danger doctrine when it involves snow and ice and the newly refined definition of open and obvious in *Lugo* can only mean that the snow and ice analysis in *Quinlivan* is now subsumed in the newly articulated rule set forth in *Lugo*. Specifically, the analysis in *Quinlivan* will now be part of whether there are special aspects of the condition that make it unreasonably dangerous even if the condition is open and obvious. [*Corey (On Remand), supra* at 8.]

This Court has also held snow and ice on steps to be an open and obvious condition where the plaintiff was "a reasonable person who recognized the snowy and icy condition of the steps and the danger the condition presented." *Corey (On Remand), supra* at 5. Plaintiff claims that she was unable to see whether there was any ice or slush at the end of the ramp due to lighting conditions. However, plaintiff's own testimony shows that she recognized the "snowy and icy condition" of defendant's premises, and that she took what she believed to be reasonable precautions. The relevant inquiry here is not whether plaintiff subjectively saw the specific hazard that caused her injury, but rather, whether "under the circumstances, 'an average user with ordinary intelligence [would] have been able to discover' the condition of the [ramp] and the risk it presented." *Joyce, supra* at 239 (quoting *Novotney, supra* at 475). Moreover, this Court has held a snowy, icy pavement to be an open and obvious hazard where, as here, a plaintiff was "undoubtedly aware of the condition and the specific, potential danger of slipping . . . ." *Joyce, supra* at 239.

Accordingly we hold that the trial court correctly ruled that the hazard that caused plaintiff's injuries was open and obvious.

As examples of special aspects rendering open and obvious conditions unreasonably dangerous, our Supreme Court, in *Lugo, supra*, cited a hypothetical commercial building with only one exit and the floor in front of it covered in standing water, and a hypothetical unguarded, thirty-foot-deep pit in the middle of a parking lot. *Lugo, supra* at 518. In the former example, the Court reasoned that though the hazard would be open and obvious, it would also be effectively unavoidable by invitees; in the latter, the Court reasoned that such a pit might well be open, obvious, and easily avoided, but nevertheless posed such a high risk of severe harm and injury as to be an unreasonable danger. *Id*. The Court intended to limit liability to cases where "*unusual* open and obvious conditions could exist that are unreasonably dangerous because they present an *extremely high risk of severe harm* to an invitee." *Lugo, supra* at 518-519 n 2 (emphasis added).

Plaintiff further maintains that, notwithstanding the open and obvious nature of the hazardous condition of defendant's premises, the condition possessed special aspects that made it unreasonably dangerous and gave rise, under *Lugo*, *supra*, to a duty on defendant's part to take reasonable steps to protect plaintiff from harm. Plaintiff says that the only alternative to the ramp were steps that she believed to be too steep. However, our review of the record leads us to the conclusion that the evidence, even in a light most favorable to plaintiff, would not allow a reasonable finder of fact to conclude that defendant's premises posed "an *extremely high risk of severe harm* to" plaintiff. *Lugo*, *supra* at 518-519 n 2 (emphasis added). Moreover, plaintiff has failed to present evidence that the hazardous condition of the ramp was effectively unavoidable. By her own admission, the stairs were available to her as well. Plaintiff believed the stairs to be too steep, but there was no other evidence presented that showed them to be too dangerous to use. Accordingly, no reasonable jury could infer from the evidence presented that the hazardous condition that caused plaintiff's injury was unavoidable.

Accordingly, we hold that the trial court did not erred when it granted summary disposition in favor of defendant.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad